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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/DTS)
Liability Litigation)
) June 12, 2019
) Minneapolis, Minnesota
) Courtroom 12W
) 9:30 a.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)APPEARANCES

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(Appearances continued next page:)

1 that plaintiffs need definitive or absolute proof.

2 3M also never mentions that when there is
3 conflicting expert testimony, that that precise conflict
4 goes to the jury not to the District Court. 3M does
5 acknowledge as it should based on a long line of authority
6 that only where an expert opinion is so fundamentally
7 unsupported, so fundamentally unsupported that it could
8 offer absolutely no assistance to the jury, only then should
9 it be excluded and indeed 3M was a party to the *Wood v. 3M*
10 case in which the Eighth Circuit made that statement, which
11 dates back to *Loudermill* all the way up to this Court's
12 December 13, 2017, Order acknowledging that that is the
13 appropriate standard.

14 3M is asking this Court to resolve disputes about
15 expert testimony in its favor, which is contrary to black
16 letter authority that says it is an abuse of discretion to
17 do that, and that's exactly what the Eighth Circuit held in
18 *Johnson*.

19 All of the cases that 3M cites are inapposite. 3M
20 hinges its legal argument in its paper and even today on the
21 Supreme Court's decision in *General Electric v. Joiner* where
22 Justice Rehnquist upheld the district court's decision
23 excluding the plaintiffs' expert testimony. In that case,
24 the plaintiff alleged that his exposure to particular types
25 of PCBs caused a particular type of lung cancer that he

1 the other evidence, and if a mechanism can support an
2 association whether or not there is an association there,
3 they can still do causal inference. And that's at footnote
4 180 of the Reference Manual says, "even in the absence of
5 epidemiologic studies, there can still be general
6 causation." That's why the Eighth Circuit said it in
7 *Bonner*. That's why the Eighth Circuit said it in
8 *Glastetter*. That's what the District Court in *Viagra* said.
9 That's why no Court has ever concluded and even Reed an
10 epidemiologic or statistically significant association to do
11 causal inference.

12 THE COURT: To the extent the study is to be used
13 at all, mustn't there be a count taken of the confounders?

14 MR. SACCHET: So two responses. One, there is no
15 a priori basis in any of the scientific literature to
16 suggest that the particular types of antithrombotic and
17 antibiotic that were used in the McGovern study confound
18 deep joint infection rates, and I can go into that more
19 deeply in a second.

20 But, second, even assuming arguendo that there
21 were confounders, this Court's Order citing *Johnson* made
22 clear that an expert need not account for every possible
23 explanation for the cause of an outcome, and indeed every
24 single MDL court said the same thing.

25 Judge Rogers, for example, in the *Abilify* decision